Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
October Term, 2000

LINA PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER IT IS A VIOLATION OF DUE PROCESS FOR PROSECUTOR IN FEDERAL CRIMINAL CASES TO BOLSTER THE CREDIBILITY OF THEIR WITNESSES BY INTRODUCING INTO EVIDENCE PLEA AGREEMENTS WHICH CONTAIN PROMISES BY THE WITNESSES TO TAKE AND PASS POLYGRAPH EXAMINATIONS AT THE GOVERNMENT'S REQUEST?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings who were not listed in the caption of the case:

Miguel Del Aguila, Esq.: co-defendant's attorney;
Mauricio L. Aldazabal, Esq.: co-defendant's attorney;
Jorge E. Alonso, Esq.: co-defendant's attorney;
Ivan Alvarez: co-defendant;
Lizette M. Babun, Esq.: co-defendant's attorney;
Concepcion Barron: co-defendant;
Joseph A. Chambrot, Esq.: co-defendant's attorney;
Tomasa Nancy Del Val: co-defendant;
Gregory C. Denaro, Esq.: co-defendant's attorney;
Nathan P. Diamond, Esq.: co-defendant's attorney;
Jesus Diaz: co-defendant;
Manuel Diaz: co-defendant;
Humberto Rolando Dominguez, Esq.: co-defendant's attorney;
Ramon Dominguez: co-defendant;
Israel Jose Encinosa, Esq.: co-defendant's attorney;
Manuel F. Fente, Esq.: co-defendant's attorney;
Luis Fernandez, Esq.: co-defendant's attorney;
Omar Fernandez: co-defendant;
Barbara Gonzalez: co-defendant;
Marta Guerrero: co-defendant;
Raquel Harrington: co-defendant;
Elsa Hernandez: co-defendant;
Eusebio Huerta: co-defendant;
Scott T. Kalisch, Esq.: co-defendant's attorney;
Gloria Lopez: co-defendant;
Ryon McCabe: Assistant U.S. Attorney;
Esther Mendez: co-defendant;
Lawrence R. Metsch, Esq.: co-defendant's attorney;
Stuart Robert Mishkin, Esq.: co-defendant's attorney;
Samuel Mones, Esq.: co-defendant's attorney;

Andres G. Montero, Esq.: Perez' trial attorney;
Richard Moore, Esq.: co-defendant's trial attorney;
The Hon. Federico A. Moreno: U.S. District Court Judge;
Mark E. Panunzio, Esq.: co-defendant's attorney;
Alberto Pariente: co-defendant;
Joaquin G. Perez, Esq.: co-defendant's attorney;
Zenaida Perez: co-defendant;
Jesus Punales: co-defendant;
Frank Quintero, Esq.: co-defendant's attorney;
Victor Rocha, Esq.: co-defendant's attorney;
Betty Rodriguez: co-defendant;
Rafael Rodriguez, Esq.: co-defendant's attorney;
Nelson Rodriguez-Varela, Esq.: Perez' trial attorney;
Julio Ferrer-Roo, Esq.: co-defendant's attorney;
Thelma Rubal: co-defendant;
Sori Ruidiaz: co-defendant;
Luis Sabatela: co-defendant;
Thomas E. Scott: U.S. Attorney;
Jose Socarras: co-defendant;
Edward N. Stamm: Assistant U.S. Attorney;
G. Richard Strafer, Esq.: appellate counsel for Lina Perez;
Steven A. Tyrrell: Assistant U.S. Attorney;
Felicia Valera: co-defendant;
Otto Villamizar: co-defendant;
Clara Villota: co-defendant;
Kenneth H. White, Esq.: co-defendant's attorney;
William Xanttopoulos, Esq.: co-defendant's attorney.

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OPINION BELOW

Petitioner seeks review of the December 12, 2000, unpublished opinion of the United States Court of Appeals for the Eleventh Circuit in *United States v. Lina Perez*, 11th Cir. No. 00-11034 (11th Cir. Dec. 12, 2000)(per curiam). *See* **APPENDIX A**.

JURISDICTION

This petition has been filed within 90 days of December 12, 2000, the date the Eleventh Circuit filed its opinion in *United States v. Lina Perez*, 11th Cir. No. 00-11034. *See* Supreme Court Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision, the pertinent portions of which is set forth below:

> No person shall ... deprived of life, liberty, or property, without due process of law....

U.S. CONST., AMEND. V.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On December 17, 1998, the government charged petitioner, LINA PEREZ, and 25 other defendants in a 4-count indictment. (R1-3.)[1] Counts 1 and 2 charged 9 co-defendants with violating and with conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* Count 4 charged 11 co-defendants with conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h). (R1-3.) Perez, however, was charged only in Count 3. Count 3 charged all 26 defendants with conspiring to obtain fraudulent payments from the Medicare program through the submission of fictitious claims for home health care, in violation of 18 U.S.C. § 286.

According to Count 3, co-defendants Elsa Hernandez, Omar Fernandez, Concepcion Barron and others used their relationships to St. Johns Home Health Agency, Inc. (hereinafter "St. Johns"), a not-for-profit Florida corporation with offices in Dade, Broward and Hernando Counties, to bill the Medicare program for fraudulent home nursing services. The indictment further alleged that appellant Perez, a nurse, operated a nursing company, Pemali Home Health Care, Inc. (hereinafter "Pemali"), which benefitted from this scheme through a subcontract with St. Johns. (R1-3-13-14.)

Prior to trial, 22 of the 26 co-defendants entered into written plea agreements with the government. (*See, e.g.*, R2-175, 178, 183, 189, 190, 192, 195, 199, 202, 205, 208, 232, 235, 239, 248,

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[1] "R__" refers to the consecutively numbered items contained in the Record-On-Appeal below.

251, 258, 261, 267.) The agreements were virtually identical. All contained express provisions requiring the co-defendants: (1) to "[p]rovid[e] truthful and complete information, testimony and documents" and (2) to submit "to polygraph examinations ... at any time during the course of [their] cooperation with law enforcement to verify the truthfulness of the information" they were to provide. *Ibid.* As discussed more fully in the Statement of Facts below, the government successfully introduced four of these agreements into evidence at trial to bolster the testimony of its witnesses. None of the co-defendants, including those who testified for the government at trial, were ever actually required by the government to undergo polygraph examinations mentioned in their plea agreements. (R6-94.)

Perez and two of her co-defendants, Raquel Harrington and Luis Sabatela, went to trial before the district court between November 10, 1999 and November 30, 1999.[2] On November 30, 1999, Perez and Harrington were convicted of Count 3, while Sabatela was acquitted. (R16-5.) On February 18, 2000, the district court sentenced Perez to serve 36 months in prison to be followed by 3 years of supervised release. (R17-35.)

B. Statement of the Facts

The government established that the Medicare program provides for the reimbursement of medical services, including nursing services, for "home bound" patients. (R5-90-91.) St. Johns possessed a Medicare provider number and, therefore, was authorized to bill Medicare for such services. (R5-94.) St. Johns, in turn, subcontracted the work to nursing groups, who provided

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[2] The last co-defendant, Jesus Diaz, remains a fugitive.

the services to the patients and who would bill Medicare for the services through St. Johns. (R5-96.) In order to properly bill nursing services for reimbursement to Medicare, a nurse must visit the patient and sign-off on notes reflecting the treatment provided. (R6-29-30.)

St. Johns billed Medicare primarily by a computerized system. (R6-32-36.) Pemali billed for 2113 visits during St. Johns' existence between 1991 and 1995. (R6-52.)

Conception Barron was the co-owner and administrator, along with her ex-husband and government witness Omar Fernandez, for other nursing groups, including Perfect Nursing, Charity Home Health Care, Prime Quality Care, Rite Aid, J.S.H. Home Health Care and Pure Care, which billed home nursing care to Medicare through subcontracts with St. Johns. (R6-99, 105, 107-108, 133; R7-17-19.) Through these nursing groups, Barron and Fernandez each billed Medicare through St. Johns for over $3 million. (R6-202; R7-51.) Barron and Fernandez hired Perez, who had worked as a nurse for over 20 years, to serve as the "Director or Nursing" or "DON" for one of their nursing groups, J.S.H. (R6-133, 209; R7-20, 39-40.)

Both Barron and Fernandez pleaded guilty to racketeering prior to trial and agreed to testify against Perez in the hope of receiving lower sentences. (R6-100-102; R7-15-17.) Over objection, the prosecutor was not only allowed to elicit testimony from Barron and Fernandez that they had "[t]o tell the truth" in order to benefit from their plea bargains but also was allowed to introduce the ***unredacted***, written plea agreements themselves into evidence. (R5-144, 151; R6-100-101; R7-16; GX CB-1 and OF-1.) The district court expressly refused counsels' requests to redact the

agreement by deleting the "truthfulness" requirement, citing the Eleventh Circuit's decision in *United States v. Cruz*, 805 F.2d 1464 (11th Cir. 1986). (R5-146-151.) However, no defense counsel raised an objection to the language in the plea agreements concerning the obligation of the co-defendants to take and pass polygraph examinations at the government's request.

Neither Barron nor Fernandez had medical backgrounds. Fernandez had previously worked as an exterminator for Orkin. (R6-111; R7-37-38.) Barron and Fernandez recruited "patients" by offering them cleaning services. Barron and Fernandez would then bill the cleaning services to Medicare as nursing visits. (R6-116.)

No nurses, in fact, saw the "patients." (R6-116.) To comply with Medicare's paperwork requirements, fictitious nursing notes were manufactured in Barron's office. The signatures of the "patients" were forged by members of her staff. (R6-128.) However, real nurses would come to Barron's office each week to sign off on the fictitious notes. (R6-117-120.) According to Barron and Fernandez, Perez was one of these nurses. (R7-24-26.) They paid Perez and other nurses $10 for each signature. (R6-120-121, 144.) Barron also claimed that Perez opened Pemali in 1992 in order to operate her own fraudulent nursing business. (R6-137.)

Jose Socarras, Barron's cousin, worked for Barron and Fernandez by recruiting "patients." (R8-171.) He eventually became a co-owner of J.S.H. Home Health Care with Barron and Fernandez. (R8-172-173.) Using that company, he also billed fraudulent nursing visits to Medicare through St. Johns. (R8-173-175.) Some of these were in Perez' name, and he paid Perez for the use of her name on two occasions. (R8-176-178; R9-17-19; GX LP-17 and LP-18.) Barron also told him that Perez knew that

her name was being used in this fashion. (R9-9.) As with Barron and Fernandez, the government successfully introduced Socarras' plea agreement, including its polygraph provision, into evidence -- this time without objection. (R8-168-169; GX JS-1.)

Alberto Pariente, Zenaida Perez and Jesus Diaz owned and operated other nursing groups, Nursing Services, Inc., Good Nursing and C&P Nursing, which billed Medicare through St. Johns. (R7-85, 88-91.) Over objection, the court allowed the prosecutor to introduce Pariente's plea agreement into evidence. (R7-6-7, 86; GX AP-1.) His plea agreement also contained both a "truthfulness" and a polygraph requirement. (*See* GX AP-1.)

Pariente testified that his companies sold cleaning services to the elderly and then billed the services to Medicare as home nursing services. (R7-93-94.) The signatures of a nurse, usually Luis Sabatela, were forged. (R7-97, 162.) He would then pay Sabatela between $8-10 for each note. (R7-99.) Pariente did not mention Perez in his testimony.

In his closing arguments to the jury, although the prosecutor did not specifically mention the polygraph provisions of the plea agreements entered into evidence, he did specifically refer the jurors to the plea agreements themselves. (R11-23; R12-7.) The jury began its deliberations on November 23, 1999. (R12-60, 80.) No verdict was reached, however, until 3:30 p.m. on November 30, 1999. (R16-4.)

C. THE ELEVENTH CIRCUIT'S OPINION

Perez appealed her conviction to the Eleventh Circuit, arguing *inter alia* that: (1) the district court committed reversible error in allowing the government to introduce into evidence its plea

agreements with its cooperating witnesses, since the polygraph provisions contained therein improperly bolstered the credibility of those witnesses; (2) the district court erred in refusing to grant a "cause" challenge to one of the prospective jurors during voir dire; and (3) the evidence was legally insufficient to sustain her conviction. On December 12, 2000, a unanimous three-judge Panel of the Eleventh Circuit rejected these arguments and affirmed Perez' conviction. *See* **APPENDIX A**.

With respect to the polygraph issue, the Eleventh Circuit exercised its discretion to reach the merits of the issue, despite the absence of a particularized objection from trial counsel, under the "plain error" standard set forth in Fed. R. Crim. P. 52(b). However, the Eleventh Circuit held that it was not error, much less plain error, for the government to introduce the plea agreements into evidence, since Perez "in her opening statement attacked the credibility of the witnesses who testified against her." **APPENDIX A**, at p. 7. According to the Eleventh Circuit, the plea agreements, including their polygraph provisions, were "properly" introduced to "rehabilitate those witnesses." *Id.*[3]

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[3] Alternatively, the Eleventh Circuit found that the introduction of the plea agreements did not affect Perez' "substantial rights," because "[t]he government's case against Perez did not depend ***entirely*** on the testimony of these witnesses." *Id.* at p. 8 (emphasis added).

REASONS FOR GRANTING THE WRIT

THE COURT MUST SAFEGUARD THE INTEGRITY OF FEDERAL CRIMINAL TRIALS BY PRECLUDING THE GOVERNMENT FROM ARTIFICIALLY BOLSTERING THE CREDIBILITY OF ITS COOPERATING WITNESSES BY INTRODUCING THEIR PROMISES TO TAKE AND PASS POLYGRAPH EXAMINATIONS CONCERNING THEIR TESTIMONY

Federal prosecutors routinely build cases against criminal defendants using the testimony of their former accomplices secured through "plea agreements" promising leniency in return for the incriminating testimony. However, at trial, such purchased testimony is frequently rejected by juries -- and for good reason. "A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993) (citations omitted). Since "[c]riminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law" -- including "lying, committing perjury, manufacturing evidence [and] soliciting others to corroborate their lies with more lies" -- juries are entitled to reject their testimony:

> Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who "sell out" and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable, openly expressing disgust with the prosecution for making deals with such "scum."

The Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 HASTINGS L.J. 1381, 1382, 1385 (1996).

Unless reversed by this Court, the Eleventh Circuit in *Perez* has given the government a method for improperly neutralizing the natural tendency of jurors to disbelieve the "highly untrustworthy and unreliable" testimony of criminal witnesses. Prosecutors may now simply insert into all plea agreements a condition that their witnesses promise to take otherwise inadmissible polygraph tests. Even if, as in this case, the tests are never given, the assurances that the government will independently, and outside the courtroom, assure the veracity of the witnesses' testimony against the defendant on trial will inevitably encourage juries to disregard their duty to judge the witnesses' credibility for themselves.

The use of a witness' promise to take a polygraph to bolster his or her testimony is improper and unjustified by existing practices. Although defense cross-examination of a witnesses concerning his or her potential bias stemming from a plea agreement permits a prosecutor to elicit the "truthfulness" requirement of such an agreement, *see United States v. Knowles*, 66 F.3d 1146, 1161 (11th Cir. 1995), cross-examination does not give the prosecutor license to misuse the agreement to bolster the witness' veracity. Indeed, attempts to bolster a witness by vouching for his or her credibility are normally improper and error. This is so, because a prosecutor, as the representative of the United States, enjoys a presumption of credibility and good faith with a jury. His or her conduct "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038,

84 L.Ed.2d 1 (1985). Since the jury believes that the prosecutor will prosecute fairly, he has an obligation "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935). The prosecutor's duty, therefore, is to embody the sovereign's goal of securing the fairness and neutrality of the judicial process. "[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'" *United States v. Agurs*, 427 U.S. 97, 110-11, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976). *See also United States v. Rudberg*, 122 F.3d 1199 (9th Cir. 1997) (reversing conviction on plain error standard due to prosecutor's vouching for key witnesses in closing argument); *United States v. Corona*, 551 F.2d 1386, 1389 (5th Cir. 1977) (improper for prosecutor to "'assert his own credibility as a basis for conviction'" by telling the jury that he was "'kind of proud'" of government witness).

Even the government's exploitation of the "truthfulness" requirement in plea agreements has its limits. For example, in *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994), the prosecutor told the jury in closing that the plea agreements of his star witnesses would be void "if the witness[es] did not tell the truth." *Carroll*, 26 F.3d at 1382. The prosecutor further argued that if "the judge believes [the witnesses] lied" they would be "jeopardizing" themselves further. *Id.* at 1382, n. 2. The Sixth Circuit held that such a use of a plea agreement "blatantly implied" that the witnesses' agreements "ensured that the witnesses were truthful" and "placed the prestige of the government, and even the court, behind the credibility" of the witnesses. *Id.* at 1389.

In so ruling, the Sixth Circuit relied heavily on the Ninth Circuit's decision in *United States v. Shaw*, 829 F.2d 714 (9th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). In that case, the prosecutor told the jury that "***as long as [the witness] is truthful, we will present his truthful cooperation*** to the local prosecutor." *Shaw*, 829 F.2d at 717 (emphasis in original). The court ruled that such arguments amounted to "improper vouching" of the witness:

> The statement does not explicitly refer to any extra-record facts.... Yet, the emphasized words necessarily imply that the prosecutor has some method of determining whether the witness's testimony is truthful, so that it will know whether to present the witness's "truthful cooperation" to the local authorities. "The unspoken message is that the prosecutor knows what the truth is and is assuring its revelation." ... In our view, the statement constitutes improper vouching.

Id. (citation omitted). *See also Rudberg*, 122 F.3d at 1206 (prosecutor's repeated references in closing to witness' "obligation to tell the truth ... left little room for the jury to doubt that the government could and did verify whether witnesses told the truth, and rewarded them only when they told the truth" and, therefore, constituted improper vouching); *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1149-50 (2d Cir.) (Friendly, J., concurring), *cert. denied*, 439 U.S. 913 (1978) (condemning prosecutor's references to requirement of truthfulness in plea agreements deemed "prosecutorial overkill" that gives jurors "the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness").

The plea agreements in this case themselves improperly implied that the government "had some method of determining" the

witnesses' veracity. Thus, the agreements stated that the witnesses had agreed to submit "to polygraph examinations ... at any time during the course of [their] cooperation with law enforcement to verify the truthfulness of the information" they were to provide. The Eleventh Circuit in this case held that the jury that convicted Perez could freely consider such promises as proof of the witness' credibility -- even though the witness' failure to pass such a test would be ***itself*** be inadmissible for any purpose. *See generally Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995). The rule adopted by the Eleventh Circuit would thus permit the government to artificially bolster the credibility of a highly suspect class of witnesses -- felons selling their testimony for freedom.

Despite advances in technology, this Court still considers polygraphs to be reliable instruments of truthtelling. *See United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). The Court has also recognized the potential for extreme prejudice from the evidentiary use of such capricious technology. "By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations" due to the "aura of infallibility attending polygraph evidence...." *Scheffer*, 523 U.S. at 313-314; 118 S.Ct. at 1267. For this reason, no court has ever approved the use or introduction of polygraph provisions as a permissible method of bolstering a witness' credibility.

The leading case in the federal system concerning the use of polygraph provisions in plea agreements is, ironically, also a decision from the Eleventh Circuit, *United States v. Hilton*, 772 F.2d 783 (11th Cir. 1985). In *Hilton*, the Eleventh Circuit reversed a defendant's conviction where the government, over objection, was

allowed to introduce into evidence the plea bargains of two witnesses which contained provisions, like those at issue in this case, in which "these witnesses had agreed to submit to polygraph examinations, though they did not actually do so." *Hilton*, 772 F.2d at 785. The Court held that such clauses constituted a form of witness bolstering that was improper and inadmissible:

> Evidence of plea agreements containing provisions that the government's witnesses have agreed to take polygraph tests to verify trial testimony constitutes improper bolstering of the witnesses' credibility. The harm from such evidence is likely to arise from a jury's lending special credence to these witnesses because of the binding force of the plea agreements. The jury might well infer that the agreement itself assures the honesty of the witnesses. Therefore, the error in allowing improper bolstering of the witnesses' credibility is prejudicial to the defendants.

Id. at 786.

Other federal and state courts agree with *Hilton* that the evidentiary use of such provisions by the government is improper. *See, e.g., United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983) (reversing convictions where the trial court admitted into evidence plea bargain documents which included polygraph examination clauses); *Brown v. State*, 587 N.E. 111, 112-113 (Ind. 1992) (holding that it was improper for the trial court to allow the prosecutor to introduce witness' plea agreement, including polygraph provision); *State v. Hocum*, 456 So.2d 602, 605 (La. 1984) (reversible error for prosecutor to inform the jury that a witness had testified under a grant of immunity that was conditioned upon his taking and passing a polygraph examination); *Sullivan v. State*, 303 So.2d

632 (Fla. 1974) (error for prosecutor to elicit from witness that part of agreement with State required him to take and pass a polygraph examination and "strongly admonish[ing] prosecutorial authorities against" such "tactics"), *cert. denied*, 428 U.S. 911 (1976); *Simeon v. State*, 520 So. 2d 80 (Fla. 3d DCA 1988) (reversing conviction where State witness stated that he took a lie detector test as part of plea bargain). *Cf. United States v. Knowles*, 66 F.3d 1146, 1162 (11th Cir. 1996) (rejecting argument that witness' testimony about a polygraph examination constituted reversible error, "because this testimony was elicited by [the defendant's] counsel himself, not the government"); *United States v. Burstyn*, 560 F.2d 779, 784 (7th Cir. 1977) (error in allowing jury to view plea agreement with polygraph clause not reversible error where issue was one of first impression and the trial court refused to allow the agreement itself to be published to the jury, but warning prosecutors to "expect reversal" in the future because such clauses suggest to juries that the witnesses have been "intimidated into truthfulness prior to trial by the ever-present possibility of a polygraph examination" and juries will, therefore, draw "the inescapable inference" that the "same story at trial is also true").

As the courts in *Hilton* and *Burstyn* recognized, references to polygraphs in plea agreements are improper even if the tests are never given. This is so, because of the improper impression given to the jurors by the promise alone:

> When the trial judge allowed the evidence to be admitted, and sanctioned the submission by the statement he made, we are of the view that he committed as egregious an error as if he had admitted the ***results*** of the test to have been received in evidence over objection. For there can be no doubt

> that in initiating the inquiry the prosecutor intended to leave in the minds of the jurors the impression that because the witness Newbold had voluntarily submitted to a lie detector test prior to the time of trial he was a man of veracity and hence was telling the truth from the witness stand, no matter how inconsistent his tale might appear to be to the jurors when compared with the testimony offered by other State witnesses.

Kaminski v. State, 63 So.2d 339, 340-41 (Fla. 1952). *Accord Brown*, 587 N.E. at 113 ("the only logical conclusion" that the jury "could deduce" from the introduction of a witness' plea agreement containing a polygraph provision was that the witness had "passed the polygraph test thus enabling him to complete his plea bargain with the State"); *Hocum*, 456 So.2d at 605 (equating informing a jury that witness' immunity was conditioned upon him taking and passing a polygraph test with evidence that the witness had, in fact, passed such a test).

By introducing a whole series of plea agreements containing polygraph provisions in this case, "the prosecutor intended to leave in the minds of the jury the impression" that the government believed its criminal witnesses were only ***now*** being men and women "of veracity and hence [were] telling the truth from the witness stand, no matter how inconsistent [their] tale[s] might appear...." *Kaminski*, 63 So.2d at 340-41.

Perez acknowledges that, since defense counsel did not raise a specific objection to the polygraph provision, the Eleventh Circuit correctly limited its review to the "plain error" standard set forth in Fed. R. Crim. P. 52(b). Courts will exercise their discretion "to correct a plain forfeited error" on direct appeal when the error is of

a kind that "seriously affected the fairness, integrity or public reputation of judicial proceedings." *United States v. Mitchell*, 146 F.3d 1338, 1343 (11th Cir. 1998), citing *United States v. Olano*, 507 U.S. 725, 735-36, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

In light of *Hilton*, the polygraph provisions were inadmissible. Therefore, the error which occurred here was obviously "plain." And, contrary to the Eleventh Circuit's decision in *Perez*, the error was likewise sufficiently prejudicial to require a reversal under Rule 52(b). The government's entire case against Perez rose or fell on the jury's willingness to accept the credibility of Barron, Fernandez, Socarras and Pariente. Unlike the situation in *Burstyn*, the government in this case was permitted to introduce the entire plea agreements, including the improper polygraph provisions, into evidence for the jury's unbridled consideration during many days of deliberations. Under these circumstances, the error inevitably undermined the integrity of the verdict. *See generally United States v. Hands*, 184 F.3d 1322, 1331-32 (11th Cir. 1999) (recognizing that where the government's case rests on witnesses of "highly questionable credibility," government misconduct may have "a substantial--perhaps overpowering--impact on the jury's deliberations) (citations omitted); *Carroll*, 26 F.3d at 1390 (prosecutor's improper bolstering of witness was not harmless, in part, because the only evidence against the defendant was from that witness); *United States v. Blakey*, 14 F.3d 1557, 1560-61 (11th Cir. 1994) (rejecting the government's attempt to avoid reversal for improper closing argument where case rested on witnesses who "possessed motives to lie").

No juror could reasonably be expected to wipe out of his or her mind the bolstering impact of the polygraph provisions in the

plea agreements. "If you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962). *Accord United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979); *United States v. Rodriguez*, 585 F.2d 1234, 1244 (5th Cir. 1978). To make sure the jury got a good whiff, the government introduced not one but ***four*** plea agreements containing the forbidden bolstering paragraphs. Accordingly, Perez is entitled to a new trial.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully request that her Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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